NPL-FF

federal register

Monday
March 13, 1989

Part VI

Environmental Protection Agency

40 CFR Part 300

The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities; Notice of Policy Statement

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-3535-2]

The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities

AGENCY: Environmental Protection Agency.

ACTION: Notice of policy statement.

SUMMARY: The Environmental Protection Agency ("EPA") is announcing a policy relating to the National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, which was promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA")) and Executive Order 12580 (52 FR 2923, January 29, 1987). CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List ("NPL"), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list.

This notice describes a policy for placing on the NPL sites located on Federally-owned or -operated facilities that meet the NPL eligibility criteria set out in the NCP, even if the Federal facility is also subject to the corrective action authorities of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"). EPA had requested public comment on this policy on May 13, 1987 (52 FR 17991); comments received are contained in the Headquarters Superfund Public Docket. Elsewhere in today's Federal Register is a rule adding Federal facility sites to the NPL in conformance with this policy.

EFFECTIVE DATE: This policy is effective immediately.

ADDRESSES: The Headquarters Superfund Public Docket is located at the U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. It is available for viewing "by appointment only" from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Telephone 202/382-3046.

FOR FURTHER INFORMATION CONTACT: Joseph Kruger, Hazardous Site Evaluation Division, Office of Emergency and Remedial Response (OS-230), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, or the Superfund Hotline, phone (800) 424-9346 (or 382-3000 in the Washington, DC, metropolitan area.)

SUPPLEMENTARY INFORMATION:

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I. Introduction

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. sections 9601-9657 (CERCLA or "the Act"), in response to the dangers of uncontrolled or abandoned hazardous waste sites. CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 *et seq.* To implement CERCLA, the Environmental Protection Agency ("EPA" or "the Agency") promulgated the revised National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP, further revised by EPA on September 16, 1985 (50 FR 37624) and November 20, 1985 (50 FR 47912), sets forth guidelines and procedures needed to respond under CERCLA to releases and threatened releases of hazardous substances, pollutants, or contaminants. In response to SARA, EPA proposed revisions to the NCP on December 21, 1988 (53 FR 51394).

Section 105(a)(8)(A) of CERCLA, as amended by SARA, requires that the NCP include criteria for "determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." Removal action involves cleanup or other actions that are taken in response to releases or threats of releases on a short-term or temporary basis (CERCLA section 101(23)). Remedial action tends to be long-term in nature and involves response actions which are consistent with a permanent remedy for a release (CERCLA section 101(24)). Criteria for determining priorities for possible remedial actions under CERCLA are included in the Hazard Ranking System ("HRS"), which EPA promulgated as Appendix A of the NCP (47 FR 31219, July 16, 1982).[1]

Section 105(a)(8)(B) of CERCLA, as amended by SARA, requires that the statutory criteria provided by the HRS be used to prepare a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list, which is Appendix B of the NCP, is the National Priorities List ("NPL"). Section 105(a)(8)(B) also requires that the NPL be revised at least annually.

A site can undergo CERCLA-financed remedial action only after it is placed on the final NPL as provided in the NCP at 40 CFR 300.66(c)(2) and 300.68(a). Although Federal facility sites are eligible for the NPL pursuant to the NCP at 40 CFR 300.66(c)(2), section 111(e)(3) of CERCLA, as amended by SARA, limits the expenditure of Superfund monies at Federally-owned facilities. Federal facility sites also are subject to the requirements of CERCLA section 120, added by SARA.

This notice announces the Agency's policy of including on the NPL Federal facility sites that meet the eligibility requirements (e.g., an HRS score of 28.50), even if such facilities are also subject to the corrective action authorities of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901-6991(i). Elsewhere in today's Federal Register EPA is adding Federal facility sites to the NPL in conformance with this policy.

II. Development of the Policy for Listing Federal Facility Sites

CERCLA section 105(a)(8)(B) directs EPA to list priority sites "among" the known releases or threatened releases of hazardous substances, pollutants, or contaminants, and section 105(a)(8)(A) directs EPA to consider certain enumerated and "other appropriate" factors in doing so. Thus, as a matter of policy, EPA has the discretion not to use CERCLA to respond to certain types of releases.

When the initial NPL was promulgated (48 FR 40662, September 8, 1983), the Agency announced certain listing policies relating to sites that might qualify for the NPL. One of these policies was that RCRA land disposal units that received hazardous waste after July 26, 1982 (the effective date of the RCRA land disposal regulations)

[1] EPA proposed major revisions to the HRS on December 23, 1988 (53 FR 51962); however, the current HRS applies to the listing of sites on the NPL until the revised HRS is finalized and takes effect. CERCLA section 105(c)(1).

would generally not be included on the NPL. On April 10, 1985 (50 FR 14117), the Agency announced that it was considering revisions to that policy based upon new authorities of the Hazardous and Solid Waste Amendments of 1984 ("HSWA") that allow the Agency to require corrective action at solid waste management units of RCRA facilities in addition to regulated hazardous waste management units.

On June 10, 1986 (51 FR 21057), EPA announced several components of a final policy for placing RCRA-regulated sites on the NPL, but made clear that the policy applied only to non-Federal sites. The Policy stated that the listing of non-Federal sites with releases that can be addressed under the expanded RCRA Subtitle C corrective action authorities generally would be deferred. However, certain RCRA sites at which Subtitle C corrective action authorities are available would generally be listed if they had an HRS score of 28.50 or greater and met at least one of the following criteria:

- Facilities owned by persons who have demonstrated an inability to finance a cleanup as evidenced by their invocation of the bankruptcy laws.
- Facilities that have lost authorization to operate, and for which there are additional indications that the owner or operator will be unwilling to undertake corrective action.
- Sites, analyzed on a case-by-case basis, whose owners or operators have a clear history of unwillingness to undertake corrective action.[8]

On June 10, 1986 (51 FR 21059), EPA stated that it would consider at a later date whether this revised policy for deferring non-Federal RCRA-regulated sites from the NPL should apply to Federal facilities.

On October 17, 1986, SARA took effect, adding a new section 120 to CERCLA devoted exclusively to Federal facilities. Section 120 explains the applicability of CERCLA to the Federal Government, and generally sets out a scheme under which contaminated Federal facility sites should be included in a special docket, evaluated, placed on the NPL (if HRS scores so warrant), and addressed pursuant to an Interagency Agreement with EPA.

As part of its deliberations on a Federal facilities listing policy, EPA considered pertinent sections of SARA and the proposed policy concerning RCRA corrective action at Federal facilities with RCRA-regulated hazardous waste management units (51 FR 7722, March 5, 1986). Specifically, that policy stated that:

- RCRA section 3004(u) subjects Federal facilities to corrective action requirements to the same extent as privately-owned or -operated facilities.
- The definition of a Federal facility boundary is equivalent to the property-wide definition of facility at privately-owned or -operated facilities.

The Agency determined that the great majority of Federal facility sites that could be placed on the NPL have RCRA-regulated hazardous waste management units within the Federal facility property boundaries, subjecting them to RCRA corrective action authorities. Therefore, application to Federal facilities of the March 5, 1986 boundary policy and the June 10, 1986 RCRA deferral policy would result in placing very few Federal facility sites on the NPL. However, CERCLA and its legislative history indicate that Congress clearly intended that Federal facility sites generally be placed on the NPL and addressed under the process set out in CERCLA section 120(e). Thus, EPA concluded that the RCRA deferral policy applicable to private sites might not be appropriate for Federal facilities. On May 13, 1987 (52 FR 17991), the Agency announced that it was considering adopting a policy for listing Federal facility sites that are eligible for the NPL, even if they are also subject to the corrective action authorities of Subtitle C of RCRA; public comment was specifically requested on this approach.

Congress' intent that Federal facility sites should be on the NPL, even if RCRA corrective action authorities apply, is evidenced by the nature of the comprehensive system of site identification and evaluation set up by CERCLA section 120, added by SARA. First, in section 120(c), EPA is required to establish a "Federal Agency Hazardous Waste Compliance Docket," based on information submitted under sections 103 and 120(b) of CERCLA, *and* sections 3016, 3005, and 3010 of RCRA.[9] Thus, the docket is based heavily on information provided by Federal facilities that are subject to RCRA. If Congress had intended that Federal facilities subject to RCRA authorities should not also be examined under the Federal facility provisions of CERCLA, then the legislators would not have directed EPA to develop a docket of facilities (for evaluation *under CERCLA*) composed largely of Federal facilities subject to RCRA.

Second, the Agency is also directed, in CERCLA section 120(d), to "take steps to assure that a preliminary assessment is conducted *for each facility on the docket*," and where appropriate, to include such facilities on the NPL if the facility meets "the criteria established in accordance with section 105 under the National Contingency Plan for determining priorities among releases." (EPA does apply the CERCLA section 105 criteria—the Hazard Ranking System (HRS)—to Federal, as well as private, sites.) Here again, if Congress had intended that Federal facilities subject to RCRA authorities not be placed on the NPL, then the legislators would not have required EPA to evaluate for the NPL all Federal facilities in the docket—the large majority of which are subject to RCRA authorities.

Third, Congress set up the Interagency Agreement (IAG) process (CERCLA section 120(e) (2)–(4)) to evaluate the need for cleanups of Federal facility sites. If all Federal facility sites subject to RCRA Subtitle C were deferred from listing and attention under CERCLA, few Federal sites would come within the IAG process, contrary to Congressional intent.

Rather, Congress intended that EPA list, and evaluate in the IAG process, all Federal facility sites that are eligible for the NPL, including those facilities subject to RCRA Subtitle C authorities. As Senator Robert T. Stafford stated during the floor debate on section 120 of SARA (subsequently section 120 of CERCLA:

> [T]he amendments require a comprehensive nationwide effort to identify and assess *all* Federal hazardous waste sites that warrant attention. 132 Cong. Rec. S 14902 (daily ed., October 3, 1986) (emphasis added).

EPA has long expressed the view that placing Federal facility sites on the NPL serves an important informational function and helps to set priorities and focus cleanup efforts on those Federal sites that present the most serious problems (50 FR 47931, November 20, 1985).

[8] On August 9, 1988 (53 FR 30002/30005), EPA published additional information on Agency policy concerning criteria to determine if an owner or operator is unwilling or unable to undertake corrective action.

[9] Section 3016 of RCRA provides for the inventory of Federal sites where RCRA hazardous waste "is stored, treated, or disposed of or has been disposed of at any time"; section 3005 of RCRA requires the filing of information necessary for the issuance of permits (or the obtaining of interim status) to treat, store, or dispose of hazardous waste under RCRA; and RCRA section 3010 requires notifications that a RCRA hazardous waste is being generated, transported, treated, stored, or disposed of.

EPA believes that today's decision not to apply the June 1988 NPL/RCRA policy (for non-Federal sites) to Federal facilities is consistent with section 120(a)(2) of CERCLA, which provides that "all guidelines, rules, regulations and criteria which are applicable to * * * inclusion on the National Priorities List, or applicable to remedial actions * * * shall also be applicable to [Federal facilities]." Given Congressional intent that Federal facility sites should be included on the NPL, EPA interprets section 120(a)(2) to mean that the criteria to list sites should not be more exclusionary than the criteria to list non-Federal sites on the NPL. As discussed in the May 13, 1987, notice on the policy (52 FR 17992–3), most Federal facilities include RCRA-regulated hazardous waste management units and thus, almost all waste contamination areas within facility boundaries are subject to RCRA corrective action authorities; in addition, key exclusions in the non-Federal RCRA deferral policy are not applicable to Federal facilities. Thus, if the non-Federal RCRA deferral policy were applied to Federal sites, very few Federal sites would be listed.

The Agency believes that although section 120(a)(2) evidences Congress' intent that the Federal agencies comply with the same baseline of requirements applicable to private sites, the section does not require that all policies and requirements applicable to private and Federal facility sites be identical. Indeed, Congress specifically set out a series of requirements which apply to Federal facilities in a manner different from, or in addition to, those applicable to private sites, e.g., the preparation of a separate Federal Agency Hazardous Waste Compliance Docket (section 120(c)); the notification required before Federal agencies may transfer property (section 120(h)); and the entire process for signing Interagency Agreements at Federal facility sites (section 120(e)(2)–(4)).

Just as Congress recognized that there are unique aspects of Federal facilities requiring additional or special attention in the contexts just named, special attention is also required in deciding what listing/deferral policy should apply to Federal versus private sites. EPA's opinion is that significant differences inherent in the rules to which Federal facility sites and private sites are subject under CERCLA and the NPL dictate that different listing and deferral policies should be crafted for each class of facilities.

For private sites, the only legal significance of NPL listing is that the site becomes eligible for *Fund-financed* remedial action, as provided in the NCP at 40 CFR 300.66(c)(2) and 300.68(a)(1) (removal actions and enforcement actions can be taken at private sites regardless of NPL status). Indeed, EPA recently suggested in the preamble to proposed revisions to the NCP (53 FR 51416, December 21, 1988) that it may be appropriate to view the non-Federal NPL "as a list for informing the public of hazardous waste sites that appear to warrant * * * remedial action through CERCLA funding alone." This relationship between the NPL and the availability of Fund monies (at private sites) is a central factor behind EPA's deferral policies. EPA has concluded that by deferring to other statutes like RCRA, "a maximum number of potentially hazardous waste sites can be addressed and EPA can direct its CERCLA efforts (and Fund monies, if necessary) to those sites where remedial action cannot be achieved by other means" (53 FR 51415, December 21, 1988). However, this goal of maximizing the use of limited Fund monies does not apply to Federal facility sites.

Federal facility sites on the NPL are not eligible for *Fund-financed* remedial actions (except in the very limited cases described in CERCLA section 111(e)(3)), pursuant to the NCP at 40 CFR 300.66(c)(2). Thus, the deferral of Federal facility sites from the NPL would not result in significant economies to the Fund, although it could do harm to the informational and management goals of including Federal facility sites on the NPL, as well as Congressional intent. Although the Agency might have decided to defer Federal facility sites subject to RCRA based on a desire to avoid duplication in remedial actions (another of the purposes behind RCRA deferral for private sites), EPA has concluded that this goal may be accomplished satisfactorily for Federal facilities through the process, set out in CERCLA section 120 (e)(2)–(e)(4), of developing comprehensive IAGs. As discussed in detail below, EPA will attempt to use the IAG process to achieve efficient, comprehensive solutions to site problems, and where appropriate, to divide responsibilities for cleanup among the various applicable authorities.

Finally, the deferral of Federal facility sites to RCRA-authorized States, in lieu of evaluation under the IAG process, may be inconsistent with the intent of CERCLA section 120(g), which provides that "no authority vested in the [EPA] Administrator under this section [120] may be transferred" to any person. 42 U.S.C. 9620(g).

III. Coordination of Response Authorities at Federal Facility Sites on the NPL

EPA recognizes that when it takes action under CERCLA to address a facility that is also subject to RCRA authorities, there is some risk of overlap or even conflict. Such conflict situations are not a problem where EPA is responsible for carrying out the requirements of both RCRA and CERCLA (since any jurisdictional overlaps can be managed within EPA). However, an overlap of authority may yield disagreements as to how a site should be cleaned up where a State has been authorized to carry out all or part of the RCRA program.[4]

However, this potential overlap between RCRA and CERCLA cleanup authorities is the result of Congressional design, not site listing. EPA neither intends nor believes that site listings themselves create a conflict between CERCLA and RCRA (or State law); rather, any conflict stems from the overlap of the corrective action authorities of the two statutes. The overlap exists whenever EPA takes CERCLA action at a site that has regulated hazardous waste management units subject to a State's RCRA program or other State law. EPA can take such CERCLA actions at sites *not* on the NPL as well as at sites on the NPL.[5] (Such conflicts may also occur at private sites as well as at Federal facility sites.) There may also be cases where the applicability of both RCRA and CERCLA authorities at NPL sites does *not* create a conflict—for example, where the RCRA hazardous waste management units are not included within the area to be addressed under CERCLA, or where the release is exempt from action under RCRA. Thus, conflict between RCRA and CERCLA corrective actions can occur at virtually any point in the process or not at all.

How RCRA authorities are affected (if at all) when CERCLA also applies to a site is a matter that varies greatly, depending upon the facts of the site. In some cases, the NPL site is physically distinct from the RCRA-regulated

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[4] EPA recognizes that many States have hazardous waste laws independent of that upon which the State's authorized RCRA program may be based. Although this policy statement focuses primarily on the mechanism for applying RCRA (by EPA or authorized States) to Federal facilities on the NPL, the same analysis would apply to non-RCRA State laws that potentially overlap with CERCLA response authorities.

[5] Removal actions, as well as remedial actions ordered under section 106 of CERCLA, may be taken at non-NPL sites. See 40 CFR 300.66(c)(2) and 300.68(a)(1).

hazardous waste management units, and corrective action or closure at the regulated units may proceed under RCRA, while at the same time a cleanup action is proceeding at another area of the property under CERCLA, without the risk of inconsistency or duplication of response action. In other cases, the releases or contaminant plumes may overlap, such that a comprehensive solution under one statute may be the most efficient and desirable solution. The questions of which authority should control, and of how to avoid potential duplication or inconsistency, are often implementation issues, to be resolved in light of the facts of the case and after consultation between EPA and the concerned State.

EPA's belief is that in most situations, it is appropriate to address sites comprehensively under CERCLA, pursuant to an enforceable agreement (i.e., an IAG under CERCLA section 120), signed by the Federal facility, EPA, *and*, where possible, the State. In some circumstances, it may be appropriate under an IAG to divide responsibilities, focusing CERCLA activity only on certain prescribed units, leaving the cleanup of other units under the direct control of RCRA authorities, such as where the RCRA-regulated hazardous waste management unit is physically distinct from the CERCLA contamination and its cleanup would not disrupt CERCLA activities. Alternatively, the IAG can prescribe divisions of responsibility, such as stating that CERCLA will address ground water contamination while RCRA will address the closure of regulated hazardous waste management units. Any disagreements in the implementation of the IAG would be resolved by the signatory parties under the dispute resolution terms of the IAG.

Of course, there may be cases where a RCRA-authorized State declines to join the IAG process, or agreement on the terms of an IAG cannot be achieved. For instance, State officials may decide that the proper closure of a landfill should be accomplished through excavation, while CERCLA officials may determine that the same area should be managed differently as part of a comprehensive CERCLA action at the site. Although EPA will try to resolve any such conflicts and achieve agreement with the State in the IAG process, there may be cases where the conflicting views of EPA and the State concerning corrective action cannot be resolved.

CERCLA section 122(e)(6), entitled "inconsistent response actions," gives specific guidance on this point:

> INCONSISTENT RESPONSE ACTION.—When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this Act, has initiated a remedial investigation and feasibility study [RI/FS] for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

As the Conference Report on SARA noted, section 122(e)(6) was included in the bill "to clarify that no potentially responsible party [PRP] may undertake any remedial action at a facility unless such remedial action has been authorized by the President" (or his delegate, EPA)[6]. *See* H.R. Rep. 962, 99th Cong., 1st Sess. at 254 (1986). *See also* 132 Cong. Rec. S14919 (daily ed., October 3, 1986) ("This is to avoid situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem.")[7] This authorization requirement applies to any remedial actions taken by a PRP, including those actions ordered by a State, as both types of action could be said to present a potential conflict with a CERCLA-authorized action.[8]

[6] The authority under section 122(e)(6) to authorize a remedial action to continue after the initiation of an RI/FS at an NPL site has been delegated to the EPA Administrator. See Executive Order 12580, section 4(d)(1) (52 FR 2923, January 29, 1987). For most non-NPL sites, the general authority for carrying out the requirements of CERCLA section 122 has been delegated to the Federal agencies for sites under their jurisdiction or control; however, the ability of the Federal agencies to authorize sites under section 122(e)(6) is limited by the provisions of section 120(a)(4), as discussed below.

[7] Congress' intent that CERCLA actions should proceed without potential conflict with other remedial action is also suggested by the language in section 7002(b)(2)(B) of RCRA, which states that RCRA citizen suits alleging an imminent and substantial endangerment may not be brought if EPA: has commenced an action under CERCLA section 106 (or RCRA 7003); is engaging in a removal action under CERCLA section 104; or has incurred costs to begin an RI/FS under CERCLA and is diligently proceeding with remedial action; or has obtained a court order (including a consent decree) or issued an administrative order under CERCLA section 106 or RCRA section 7003, and a responsible party is diligently conducting a removal, an RI/FS, or proceeding with remedial action pursuant to that order. Similarly, RCRA section 1006(b) directs the Administrator to "integrate all provisions of [RCRA] for purposes of administration and enforcement and shall avoid duplication to the maximum extent practicable," with appropriate provisions of laws (such as CERCLA) granting regulatory authority to EPA.

[8] "Remedial action" is very broadly defined in section 101(24) of CERCLA as actions consistent with a permanent remedy at a site, including confinement of a release of hazardous substances, cleanup of hazardous substances, etc. EPA believes that remedial actions within the meaning of the term may include those taken under statutes other than CERCLA, including corrective action under RCRA.

CERCLA section 122(e)(6) does not constitute a prohibition on RCRA corrective action at CERCLA sites; rather, it provides a mechanism by which the Agency must approve of remedial actions commenced at sites after an RI/FS has been initiated under CERCLA. Such an approach would help to avoid duplicative and wasteful cleanup actions. This authorization mechanism would not affect normal hazardous waste management requirements under RCRA, such as complying with manifest, 90-day storage, and labeling requirements; any RCRA-regulated hazardous waste management units operating at a CERCLA site must continue to comply with RCRA hazardous waste management requirements, even if a CERCLA response action is underway. The Agency also intends to authorize many State RCRA actions to continue, e.g., where the RCRA action addresses a unit distinct from the CERCLA contamination, and where the RCRA action will not disrupt CERCLA activities.

Even where EPA decides that it is not appropriate to authorize a RCRA or other State action to continue under CERCLA section 122(e)(6) in order to avoid disruption or duplicative actions, CERCLA section 120(f) specifically provides that participation by State officials in remedy selection "shall be provided in accordance with section 121," and CERCLA section 121(d) specifically provides a process for taking account of "applicable or relevant and appropriate requirements" (ARARs) of RCRA (as well as other State and Federal statutes) when a remedy is selected. If any State requirements are waived pursuant to CERCLA section 121(d)(4), the affected State may obtain judicial review of such waiver, and even if unsuccessful, may ensure that those requirements are met by providing the necessary additional funding pursuant to CERCLA section 121(f)(3)(B). As the Agency has noted repeatedly in the past, "it is EPA's expectation that remedies selected and implemented under CERCLA will generally satisfy the RCRA corrective action requirements, and vice versa" (52 FR 17993, May 13, 1987, and 52 FR 27645, July 22, 1987).[9]

The discretion under CERCLA section 122(e)(6) not to authorize a PRP to go forward with a remedial action at a site

[9] To the extent that this policy may be read as inconsistent with the district court's opinion in *State of Colorado v. U.S. Department of the Army*, C.A. No. 88-C-2188 (D. Colo., February 24, 1989), EPA disagrees with that opinion.

after a CERCLA remedial investigation/feasibility study (RI/FS) has begun—even if that action has been ordered by a State—is generally available at both private and Federal facility sites. However, CERCLA section 120(a)(4) provides that State laws shall apply to remedial actions—including those under CERCLA —at *Federal facility* sites that are *not* on the NPL, thus, acting as a general limitation on the more general section 122(e)(6).[10] Of course, no such limitation applies to Federal facility sites once they are placed on the NPL.

The plain language of section 122(e)(6) makes it clear that it is the RI/FS—not the listing itself—that triggers section 122(e)(6). Indeed, an RI/FS may be commenced prior to, as well as after, NPL listing.[11] This is especially true for Federal facility sites, as the President has delegated his authority to take CERCLA section 104 response actions (including RI/FSs) to the Federal agencies for most non-NPL sites (Executive Order 12580, at section 2(e)(1)).[12] Thus, when a Federal facility is placed on the NPL, an RI/FS will often have been commenced (or completed).

In order to invoke the authorization mechanism of CERCLA section 122(e)(6), EPA must make a threshold determination of whether or not an RI/FS "under this Act [CERCLA]" has been initiated; studies conducted by Federal facilities before a site has been placed on the NPL may or may not constitute an appropriate RI/FS in EPA's opinion.[13] As a matter of policy, the Agency will generally interpret CERCLA-quality RI/FSs to be those that are provided for, or adopted by reference, in an IAG. The Agency believes that such a policy is consistent with CERCLA section 120(e)(1), which directs Federal facilities, "in consultation with EPA," to commence an RI/FS within six months of the facility's listing on the NPL. In addition, the policy will promote consistency in RI/FS's, and will help to ensure that all appropriate information has been collected during the RI/FS, so that EPA may properly evaluate remedial alternatives at Federal facility sites as required under CERCLA section 120(e)(4). Further, by encouraging the development of IAGs at the early RI/FS stage, this policy may help to promote coordination among the parties, and avoid inconsistent actions.

Thus, the IAG will generally commit the Federal facility to complete both an RI/FS and any subsequent remedial action determined by EPA to be necessary.

Once an RI/FS has been commenced under (or incorporated into) an IAG, EPA must decide whether or not to authorize PRPs to continue with any non-CERCLA remedial actions (both voluntary and State-ordered) at the site. This decision will be made on a case-by-case basis, taking into account the status of CERCLA activities at the site, and the potential for disruption of or conflict with that work if the PRP action were authorized.

IV. Response to Public Comments

On May 13, 1987 (52 FR 17991), EPA solicited public comment on the Agency's intention to adopt a policy for including eligible Federal facility sites on the NPL, even if they are also subject to RCRA corrective action authorities; the Agency received six comments on the policy. EPA considered the comments raised, and responds to them as follows.

Two of the six commenters concur with the policy to include eligible Federal facility sites on the NPL and have no suggested revisions or additional comments.

One commenter "generally supports" the policy, but believes that the criteria used to list Federal facility sites are unclear. The commenter states that "as written, the proposed policy could be interpreted to mean that Federal hazardous facilities would be placed on the NPL regardless of their status under [RCRA] or their degree of actual hazard."

In response, the commenter is correct in concluding that under the policy, Federal facility sites would be placed on the NPL regardless of the facility's status under RCRA. As discussed above, this is consistent with Congressional intent that Federal facility sites should be on the NPL, and that listing criteria should not be applied to Federal sites in a manner that is more exclusionary than for private sites. However, the commenter is incorrect in suggesting that Federal facility sites will be listed regardless of the degree of hazard they present. The Agency intends to use the HRS, the same method used for non-Federal sites, to determine whether a Federal facility site poses an actual or potential threat to health or the environment and, therefore, qualifies for the NPL. (Currently, a site is generally eligible for the NPL if the HRS score is 28.50 or greater.) The application of the HRS to Federal facility sites is consistent with CERCLA section 120(d), which requires EPA to use the HRS in evaluating for the NPL the facilities on the Federal Agency Hazardous Waste Compliance Docket.

One commenter did not comment on the policy, but rather is concerned that no Superfund monies be spent at Federal facilities. The commenter believes that neither pre-remedial work (preliminary assessments and site inspections) nor remedial work should be financed by the Trust Fund.

In response, Executive Order 12580 (52 FR 2923, January 29, 1987), at section 2(e), delegates the responsibility for conducting most pre-remedial work to the Federal agencies. Therefore, the Federal agencies, rather than the Trust Fund, finance these activities, with EPA providing oversight. In addition, section 111(e)(3) of CERCLA, as amended by SARA, strictly limits the use of the Fund for remedial actions at Federally-owned facilities. Although the Administrator does have the discretion to use funds from the Hazardous Substances Superfund to pay for emergency removal actions for releases or threatened releases from Federal facilities, the concerned Executive Agency or department must reimburse the Fund for such costs. Executive Order 12580, section 9(i). The Department of Defense and the Department of Energy also have response authority for emergency removals (Executive Order, section 2(d)).

Another commenter opposes the policy of placing RCRA-regulated Federal facilities on the NPL, arguing that public notification is adequately addressed by other provisions of CERCLA (sections 120 (b), (c), and (d)), and that the policy is inconsistent with section 120(a), which requires that

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[10] Section 120(a)(4) states as follows: State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are *not* included on the National Priorities List. [Emphasis added.]

Nothing in this section prevents Federal facilities from arguing that the doctrines of laches, estoppel or implied preemption limit the effect of section 120(a)(4).

[11] *See SCA Services of Indiana, Inc. v. Thomas*, 634 F.Supp. 1355, 1361 (W.D. Ind. 1986) ("CERCLA clearly makes the conduct of an RI/FS a removal, not remedial, action, so that the restriction that remedial actions be taken only when the site is on the NPL is simply irrelevant to a RI/FS"); 52 FR 27622 (July 22, 1987) ("an RI/FS can be performed at proposed [NPL] sites pursuant to the Agency's removal authority under CERCLA").

[12] Section 104 authorities were delegated to the Departments of Defense and Energy more generally, although such functions must still be exercised consistent with the requirements of section 120 of CERCLA. Executive Order 12580, section 2(d).

[13] "RI/FS" is a term of art under CERCLA, and applies to a special site study and evaluation pursuant to section 300.68(d) of the NCP. EPA, as the agency entrusted with the development and implementation of the NCP, is the recognized expert on what constitutes an acceptable RI/FS under CERCLA.

Federal facilities comply with CERCLA in the same manner as any nongovernmental entity. The commenter believes that the adoption of the proposed policy is inconsistent with EPA's policy regarding non-Federal facilities.

In response, CERCLA sections 120 (b), (c), and (d) refer to the establishment of the Federal Agency Hazardous Waste Compliance Docket and to the evaluation of facilities on the docket for the NPL.[14] The Agency agrees that this docket will provide the public with some information regarding hazardous waste activities at Federal facilities, as well as information concerning contamination of contiguous or adjacent property. The Agency believes, however, that evaluating sites using the HRS, and placing on the NPL those sites that pose the most serious problems, will serve to inform the public of the relative hazard of these sites. The listing process also affords the public the opportunity to examine HRS documents and references for a particular site, and to comment on a proposed listing. In addition, the NPL provides response categories and cleanup status codes for sites, and deletes sites when no further response is required, adding to the informational benefits of using the NPL. Therefore, EPA believes that listing Federal facility sites will advise the public of the status of Federal government cleanup efforts, as well as help Federal agencies set priorities and focus cleanup efforts on those sites that present the most serious problems, consistent with the NCP (50 FR 47931, November 20, 1985).

As to the comment concerning CERCLA section 120(a), EPA agrees that the section provides that Federally-owned facilities are subject to and must comply with CERCLA to the same extent as any nongovernmental entity. Further, sections 120(a)(2) and 120(d) provide that EPA should use the same rules and criteria to evaluate Federal sites for the NPL as are applied to private sites. However, today's policy is not inconsistent with those sections. As a threshold matter, it is uncontroverted that an HRS score of 28.50 or greater is an eligibility requirement for both Federal and private sites. The question is, should NPL-eligible Federal sites be deferred from listing as a matter of policy. As explained above, the Agency does not believe that CERCLA section 120(a)(2) can be read to require identical treatment of Federal and private sites in all circumstances; the fact that Congress legislated a number of requirements in addition to, or instead of, those applicable to private facilities (e.g., sections 120 (c), (e)(2), (h)), demonstrates the legislators' recognition of the need to address certain unique aspects of Federal facilities differently than for private sites. Rather, EPA interprets CERCLA section 120(a) to mean that the criteria to list Federal facility sites should not be more exclusionary than the criteria to list non-Federal sites. In this case, it is clear that if EPA were to apply the non-Federal RCRA deferred listing policy to Federal facilities, very few Federal sites would be considered for the NPL, counter to the spirit and intent of section 120 (c) and (d) of CERCLA and the statute's legislative history. Moreover, one of the key factors in EPA's decision to adopt a RCRA deferral policy for private sites—the need to manage and conserve Fund resources—does not apply to Federal facilities because the remedies are not Fund-financed. EPA believes that it is appropriate, and consistent with Congressional intent, to take these differences into account, as long as the result is not to treat Federal agencies in a more exclusionary manner than private facilities.

Two commenters expressed concern that listing Federal facility sites might interfere with enforcement activities under RCRA. One commenter stated that the policy is inconsistent with CERCLA section 120(i), which requires that Federal facilities comply with all RCRA requirements.

In response, the Agency's view is that today's policy will facilitate enforcement activities at Federal facility sites, not interfere with them. In effect, by encouraging the drafting of comprehensive IAGs for Federal facilities, this policy will advance the goal of site remediation. In addition, the IAG process allows EPA to take steps to avoid duplication and conflict; the IAG may define areas of a Federal facility that may efficiently be addressed under RCRA (e.g., units that are distinct from, and do not disrupt, CERCLA activities). In addition, States will be encouraged to become signatory parties to IAGs, reducing the likelihood of intergovernmental conflict over jurisdiction and the selection of remedy.

In any event, it is not the act of placing a site on the NPL that creates a potential conflict between CERCLA and RCRA; rather, the corrective action authorities of the two statutes overlap, pursuant to statutory design. Indeed, the alleged interference with RCRA corrective actions by CERCLA cleanups can occur at any point in the process, depending upon the specific facts of the case. In those cases where the relevant statutes do overlap, EPA believes that one of the statutes must sometimes be chosen for practical reasons, and Congress has set out a procedure for resolving such conflicts in CERCLA section 122(e)(6).[15] However, the goal of today's policy is to minimize any such conflicts through the IAG process.

The Agency acknowledges that in the case of Federal facilities, listing does have a significance not present for private sites. For instance, CERCLA section 120(e)(2) provides that for Federal facility sites *on the NPL*, EPA will play a role in selecting remedies, while CERCLA section 120(a)(4) provides that State laws concerning removal and remedial actions shall apply to Federal facilities when such facilities are not on the NPL (the section does not discuss how State laws apply at Federal sites that are on the NPL). However, any difference in EPA or State roles at NPL versus non-NPL Federal facility sites results from the statutory scheme reflected in CERCLA sections 120(a)(4) and 121(d), and not from the act of listing itself. CERCLA directs EPA to list Federal sites on the NPL and then specifies certain statutory consequences.

Further, merely alleging that there may be some effect on State enforcement actions as a result of a policy of including Federal facilities on the NPL is not grounds for rejecting today's policy. The Agency has reviewed both sides of the question, and has determined that it is in the best interest of the public and environmental protection to place Federal facility sites on the NPL and thus to make CERCLA authorities available to achieve comprehensive remedies for contamination at such sites (when appropriate). In addition, the IAG process, as discussed in this policy, will serve to minimize duplication and inconsistency with potential State orders.

[14] Pursuant to section 120(c) of CERCLA, EPA published the Federal Agency Hazardous Waste Compliance Docket on February 12, 1988 (53 FR 4280). The docket was established based on information submitted by Federal agencies to EPA under sections 3005, 3010, and 3016 of RCRA and under section 103 of CERCLA. The docket serves to identify Federal facilities that must be evaluated in accordance with CERCLA section 120(d) to determine if they pose a risk to public health and the environment. Section 120(d) requires EPA to evaluate facilities on the docket using the HRS for possible inclusion on the NPL.

[15] It is important to note that the section 122(e)(6) authorization requirement at Federal facilities is not triggered automatically by NPL listing, but rather takes effect where an RI/FS has been initiated at a listed Federal site; as a matter of policy, this start-up point for the RI/FS will not be recognized in most cases until an enforceable IAG has been signed, which may be well after a site is listed.

EPA also disagrees with the commenter's suggestion that today's policy is inconsistent with CERCLA section 120(i), which provides that "nothing in this section [120] shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [RCRA] (including corrective action requirements)." EPA interprets that section simply to mean that section 120 does not impair otherwise applicable RCRA requirements; this mandate is met even if an action is conducted under CERCLA, as CERCLA section 121(d)(2) specifically provides that ARARs of RCRA and State law must be achieved with regard to any on-site remedy. Even if a RCRA or State requirement that is an ARAR is waived by EPA (section 121(d)(4)), the State may obtain judicial review of such a waiver, and even if unsuccessful, may require that the remedial action conform to the requirement in question by paying the additional costs of meeting such standard (CERCLA section 121(f)(3)); thus, the intent of section 120(i) is satisfied.

This interpretation of section 120(i) follows directly from the language of the provision itself, which states that "nothing in this section"—as compared to "nothing in this Act"—shall affect RCRA obligations. This leaves in place limitations contained in *other* sections of the statute, such as the permit waiver provision (section 121(e)); the process for selecting and waiving ARARs (sections 121 (d)(2) and (d)(4)); and the ban on remedial actions not approved by the President (section 122(e)(6)).

For all these reasons, the Agency believes that today's Federal facilities listing policy is appropriate, that it reflects Congressional intent, and that it is consistent with CERCLA.

Pursuant to the policy described in this notice, the Agency will place eligible Federal facility sites on the NPL even if the site is also subject to the corrective action authorities of Subtitle C of RCRA.

Date: March 6, 1989.

Jonathan Z. Cannon,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 89-5893 Filed 3-10-89; 8:45 am]
BILLING CODE 6560-50-M